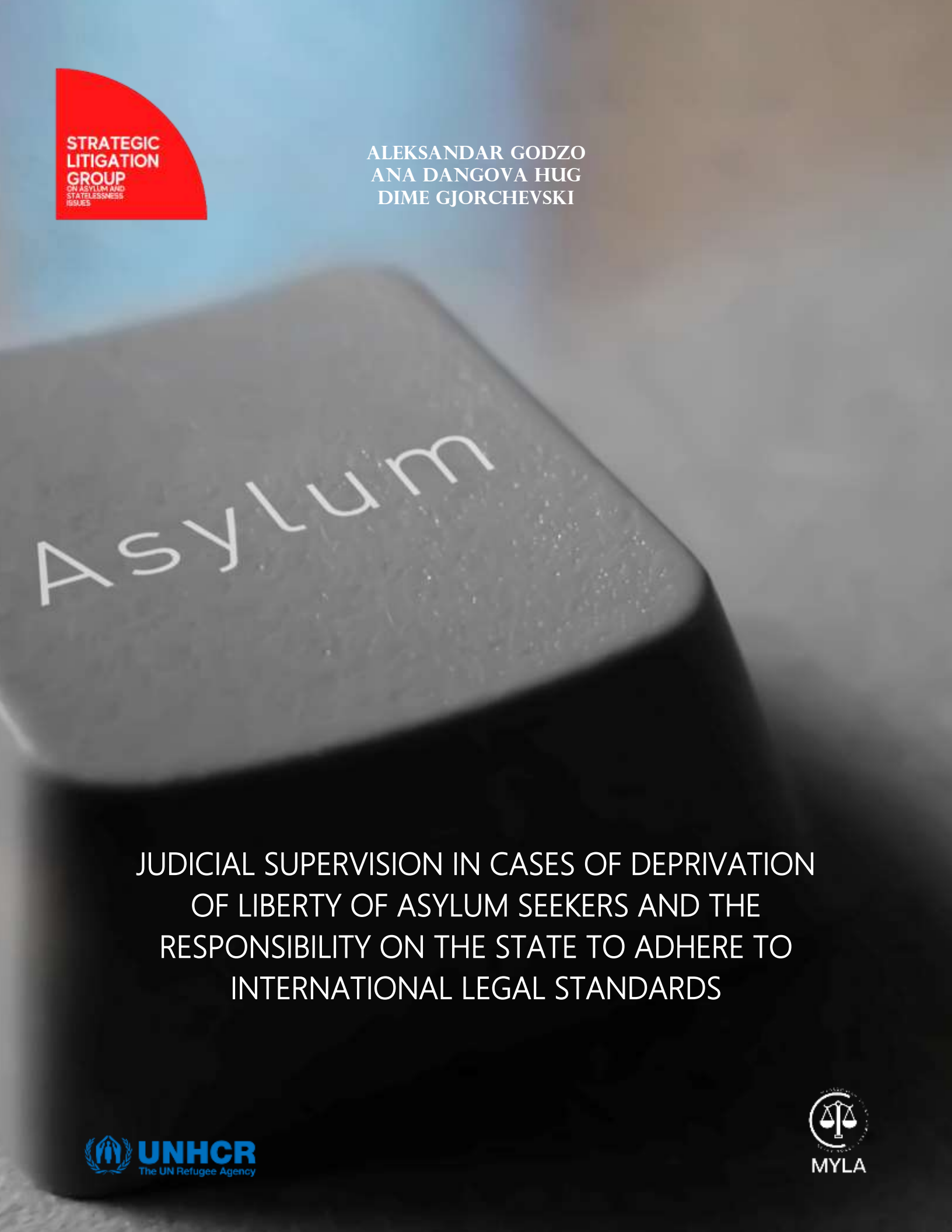

STRATEGIC LITIGATION GROUP ON ASYLUM AND STATELESSNESS ISSUES

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JUDICIAL SUPERVISION IN CASES OF DEPRIVATION OF LIBERTY OF ASYLUM SEEKERS AND THE RESPONSIBILITY ON THE STATE TO ADHERE TO INTERNATIONAL LEGAL STANDARDS

UNHCR The UN Refugee Agency

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The authors are lawyers in North Macedonia and members of the Strategic Litigation Group on Asylum and Statelessness Issues established by the Macedonian Young Lawyers Association.

This publication is supported by the UNHCR Representation in Skopje. The opinions and standings stated in this publication are solely belonging to the author, and do not necessarily reflect the official standings of the UNHCR.

Abstract

A unique case of an asylum seeker inspired this paper. The case brought international attention, and ultimately led to the first-ever Rule 39 Decision against the Republic of North Macedonia by the European Court of Human Rights (ECtHR). The relevant timeline coincided with the promulgation of the new Law on International and Temporary Protection, enacted in the absence of a more in-depth debate on some of its key procedural and substantive provisions, and namely, the ones relating to deprivation of liberty and judicial review of such deprivation.

It would seem that the domestic authorities, both administrative and judicial, continue to fail to pay sufficient attention to international law and to understand why and how to interpret and use international standards and

relevant case law. Therefore, this paper will also briefly elaborate how states may be held accountable based on standards set elsewhere.

Furthermore, we will examine whether or not the present envisaged proceedings in the Law on International and Temporary Protection (LITP) provide for a sufficient, effective and speedy review of deprivation of liberty and of the restrictions on freedom of movement of asylum seekers and observe the available remedies in that respect.

Evolution in the treatment of foreign nationals, including asylum seekers

In theory, democratic societies that adhere to positive obligations deriving from their laws and regulations and international instruments should have the same degree of scrutiny compared to their nationals and foreigners. However, this is not always the case probably because there are various historical, political, economic, and even religious variables into the equation.

Even before the establishment of legal norms, customs and religion were used to preach standards of conduct towards foreigners.[1] [2] Especially after the most horrific moments in human history brought about by World War II, modern standards of human existence led to the formation of organizations to promote and protect human rights to correct what was done with the Edict of Fontainebleau issued by Louis XIV in 1685, the Muhaciris, the Pogrom and the First World War and to prevent similar atrocities from happening again.[3]

Despite such efforts, humanity seems not to have learned some crucial lessons. On the contrary, the consciousness regarding human rights that rose to a higher level, in some cases and areas slid back to old practices in recent years, sometimes to the level of pure hypocrisy of humanity. In this line, instead of gradual improvements over time, the status of the refugees and the protection of their rights seems to worsen.

Such limited protection could be related to the rise in populism and the need to protect national borders. This is done at the expense of the rights of persons in need of international protection, and the national interests of states are given priority as part of states' national security efforts.

North Macedonia has fulfilled its obligations, at least *pro forma* in transcribing and promulgating necessary legislation and adhering to international instruments related to the treatment of foreign nationals, refugees and asylum seekers. And this certainly needs to be complimented. Our interest, however, is the substance and the application of legislation.

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[1] The Gospel of Matthew.
[2] Quran 8.72, 8.74.
[3] http://www.theguardian.com/news/datablog/interactive/2013/jul/25/what-happened-history-refugees#Puppet governments

The LITP of 2019

The new LITP grants the State more significant opportunities to consider the request for recognition of the right to asylum as unfounded and to enable restrictions of the freedom of movement of asylum seekers.

We hypothesize that through the practice of its institutions, the country has repeatedly shown that it denies asylum seekers the right to an individual assessment of the need for international protection, which is contrary to international and European refugee law and human rights.

The new provisions allow for selective and arbitrary policies regarding the admission of refugees to the country's territory. This policy has been in force since the start of the refugee crisis when North Macedonia and Europe closed their borders.

The practices implemented by North Macedonia confirm that refugee rights continue to be exposed to intimidation and that decisions are reached based on pragmatism and pressure on people to return to places where their health and life are at risk.

The problem is that little efforts are made to consider refugees' concerns because human rights policies in North Macedonia stand on the feeble ground. What is happening today as a result of the refugee crisis is an indication that it was not Europe facing a refugee crisis, but quite the opposite - the European crisis is facing refugees.

The fact that the whole continent was cordoned off, combined with criminalizing the cutting of the fences of refugees seeking to flee the war, and the rhetoric of European media that focused on terrorism and sexual violence, only shows that our continent is facing an existential crisis.[4]

At that time, people without regulated legal status remained locked up in camps that were intended only for transit through them, without basic living conditions, without the right to leave the camps, with a restrictive and almost inaccessible right to seek asylum in North Macedonia.

The fact that their right to seek asylum was restricted meant that the refugees who tried to exercise such rights were denied. Rights were usually granted after an asylum procedure is initiated, including the right to housing, right to social security and health care, right to education.

[4] http://fortune.com/2016/03/17/eu-turkey-migrant-crisis-deal-disaster/

This new law was supposed to introduce clearer procedures, with adherence to international standards throughout the procedure and fully in compliance with all international standards, especially in cases where deprivation of liberty is concerned.

The example analyzed in this paper confirms that the policy has not changed even if the influx of refugees has subsided.

We believe that certain undertakings must be made to repair the "broken" asylum system in the country, insofar as the observance of detention standards are in question, and to introduce a more transparent and more dignified procedure. This will allow an appropriate procedure for the reception of refugees, adequate accommodation, a fair, fast and transparent procedure, with full respect of the rights of asylum seekers and other migrants.

To do so, North Macedonia must stop the policy of selective admission and fulfil the legal obligations to ensure fair and thorough procedures for determining refugee status for persons of all nationalities. It should also acknowledge that these people urgently need protection and reexamine its stance on protecting borders from non-existent threats at the expense of human rights.

Case of X.X[5].

Extracting a single case from certain types of cases and relying solely on the facts and the law applied may limits the applicability of the conclusions. We undertake such risks and try to draw conclusions which may point to procedural and substantive deficiencies in the legal system.

The selected case is unique due to the speediness of which asylum request was being decided and ultimately denied, as well as the unusual speed by which the two administrative courts denied the claim filed by the applicant.

The case summary is given bellow:

On October 15, 2018, the person X.X., has applied for recognition of asylum to the Ministry of Interior (MoI), Department of Civil Affairs, Asylum Sector. With a decision from 2018 the MoI rejected the request for recognition of the right to asylum. The administrative organ found that that because there is no fear of persecution in terms of Articles 5 and 9 of the Law on International and Temporary Protection, there is no reason to believe that if X.X. returns to the country of citizenship, X.X. would face a real risk of suffering severe injuries.

After exhausting all domestic remedies, the decision remained unchanged.

In 2018 the Sector for Asylum, submitted a request for restricting the freedom of movement of X.X. due to a threat to national security.

[5]Due to protection of the person's identity, all personal information are anonymized.

The Department of Border Affairs issued a decision imposing accommodation in the Reception Center for Foreigners for protection of public order or national security, for 3 months.

The Decision does not contain any material evidence based on which the Asylum Department assessed that X.X. posed a threat to national security. The Public Security Bureau followed this flat action of the Asylum Department, Border Affairs and Migration Department, that initiated a procedure for determining the merits of the request and determined that the conditions of Article 63 paragraph 1 and 2, line 3, Article 64 paragraph 1, line 2 and Article 65 of the LITP have been met, without arguing upon the facts and providing material evidence

In 2018, X.X. submitted a request to recognize the right to asylum in the Republic of Macedonia and was transferred to the Reception Center for Asylum Seekers in Vizbegovo. Under Article 62 paragraph 3 of the Law on International and Temporary Protection, she submitted an orderly request to the Ministry of Labor and Social Policy to stay outside the Reception Center for Asylum Seekers in Vizbegovo, which request was accepted by the Ministry of Labor and Social Policy.

Until the moment of the detention in the Reception Center for Foreigners, X.X. communicated most regularly and orderly with the Department of Civil Affairs, the Asylum Sector, with her proxies, duly appeared at the scheduled interview where X.X. clearly and unequivocally explained the facts and the circumstances due to which X.X. seeks protection in the Republic of Macedonia.

It is worth noting that X.X., a parent of 4 children, was forced with no choice but to leave them in the country of origin against the will. Moreover, it is not clear how X.X. could pose a threat to public order or national security without any piece of material evidence supporting this claim of the State. Of course, when a threat to national security is material to any case, states are being extended a somewhat broad margin of appreciation. However, any lack of reasoning whatsoever in itself constitutes a violation. Moreover, it seems that the bodies deciding in this case, appear not to have any need to provide such reasons, neglecting the fact that judicial review should be the protector and a corrector of the actions/omissions by the executive branch, i.e. the Ministry.

This falls below the bar set with the European Convention on Human Rights (ECHR) and its Protocols, especially Article 1 of Protocol 7 to the ECHR.

The authorities did present evidence that confirms that X.X. poses a security thread and the grounds on which such decisions were based were not clarified. As a result, without even a brief overview of the facts and grounds for the decision, X.X. could not present the case properly in further court review. X.X. did not have access to the documentation, she did not know why she was considerd to constitute a danger and she could not effectively appeal the decision. Therefore, she was unable to challenge the authorities claim that national security is endangered (*Ljatifi v North Macedonia*).[6]

[6] https://biroescp.gov.mk/wp-content/uploads/2016/12/%D0%89%D0%90%D0%A2%D0%98%D0%A4%D0%98-%D0%BF%D1%80%D0%BE%D1%82%D0%B8%D0%B2-%D0%A0%D0%95%D0%9F%D0%A3%D0%91%D0%9B%D0%98%D0%9A%D0%90-%D0%9C%D0%90%D0%9A%D0%95%D0%94%D0%9E%D0%9D%D0%98%D0%88%D0%90-%D0%9F%D1%80%D0%B5%D1%81%D1%83%D0%B4%D0%B0.pdf

In *Ljatifi v. Republic of North Macedonia*, the procedural guarantees were in fact not met, insofar the international law was concerned. Same is the case with the instant case. X.X's freedom of movement was restricted, and there was no speedy review of this restriction. The mere fact that the domestic LITP does not envisage specific time frames for such review is not a defense. If the international standards quoted above prescribe that there must be a speedy and an effective review of any form of deprivation of liberty, regardless of the potential lawfulness of the domestic proceedings, it does not mean that in fact an internationally wrongful act has not taken place.

The courts only formally examined the case and confirmed that the X.X. was a risk to national security without substantive review. The lack of such review suggests that the relevant authorities failed to adequately examine the claim and elaborate on how X.X. posed a risk to national security. Therefore, no effective remedy has been made available to X.X. Even in the case of a possible security threat, the establishment of this fact must be subject to adversarial proceedings before an independent body or court, tasked to clearly establish the facts, review the relevant evidence and explain the decision reached. As a result, X.X. was not provided with minimal procedural guarantees in the procedure in which the final consequence for X.X. was to leave the country.

The manner in which the courts decided the case, does not constitute an appropriate judicial review of the decision, i.e., it does not constitute an effective remedy.

X.X's attorneys applied for a visit to the Gazi Baba Foreigners Reception Center to contact her. Although the attorneys appeared at the entrance of the Center for Foreigners in Gazi Baba, where X.X. was detained, the officials replied that they would not be able to see X.X. Lack of a contact with a lawyer is contrary to domestic and international laws on legal representation.

The right to an attorney, including the right to contact a lawyer, is guaranteed, to any defendant regardless of the severity of the criminal act they are being suspected of or charged with. However, in this case where X.X. ran away from terror and discrimination, this essential human right crucial for the functioning of judicial proceedings and the protection of the human rights in said proceedings was limited.

X.X. was allowed to leave North Macedonia via Skopje Airport, following the Ruling of the ECHR on Rule 39 Application filed on behalf of her lawyer. What is peculiar is that the decision depriving X.X. of the freedom of movement was not abolished before X.X. being allowed to leave the country, and to date, the Court has not ruled on the legality of her detention.

The case demonstrates the arbitrary application of laws and raises the question of the quality of relevant domestic provisions and to what extent they are (or are not) under the standards of international law, especially the ECHR.

Problem arises when domestic courts view only the contents and practice of the domestic legislation and domestic institutions and fail to consider or do not consider international standards and case law. There is nothing wrong with relying solely on domestic law, insofar that reliance complies with internationally assumed obligations. It seems that this premise is the core of the problem that we are trying to address.

Discussion

National laws must be accessible and predictable and should guarantee protection against arbitrary interference and decision-making by the bodies in protected rights with the ECHR.

Authors argue that it is unconstitutional and contrary to the commitments that North Macedonia has agreed to via international conventions for the MoI to restrict the freedom of movement of asylum seekers with a decision and treat them as detainees, with only a virtual right to judicial protection.

Freedom of movement can be restricted only by a court decision, and not by an administrative body based on administrative acts. Certainly, states enjoy a margin of appreciation when it comes to detention or restriction of freedom of movement by administrative bodies, however quick and effective judicial review of such detention is always warranted and required.

From the LITP's perspective, one may argue that the judicial protection envisaged through the Administrative Court is a quasi-judicial protection because the Administrative Court primarily assesses the legality of a decision.

However, this is a contradictory topic, as the decision is made based on law (formal legality). Administrative courts, as a rule, do not decide on substantive legality or do so in a very limited scope and manner. Hence, one conclusion may be that those administrative courts are not courts of adequate quality for the protection of human rights as required by the Constitution and the ECHR.

An asylum seeker should enjoy different treatment to those arrested or detained on suspicions of committing a criminal act. Moreover, it is debatable whether an administrative body can be deciding on the restriction of the freedom of movement of refugees and asylum seekers.

Holding a person in a secured facility of a closed type is considered by ECtHR as a classic example of deprivation of liberty. And the "reception center" is a closed facility.

However, despite all the grave concerns discussed in this opinion, the Constitutional Court considers that the LITP is, in fact, constitutional and under EU law and that the freedom of movement of refugees and migrants can be restricted by an administrative body, not just the court.[7]

[7] https://myla.org.mk/wpcontent/uploads/2020/02/%D0%9C%D0%BB%D0%B0%D0%B4%D0%B8%D%82%D0%B5-%D0%BF%D1%80%D0%B0%D0%B2%D0%BD%D0%B8%D1%86%D0%B8-%D0%BD%D0%B0%D1%81%D0%BF%D0%BE%D1%80%D1%82%D0%B8-%D0%A3%D1%81%D1%82%D0%B0%D0%B2%D0%BD%D0%B8%D0%BE%D1%82-%D1%81%D1%83%D0%B4-%D0%A8%D0%BA%D0%B0%D1%80%D0%B8%D1%9C.pdf

Therefore, it is important to make substantial review of relevant laws on the treatment of refugees and asylum seekers and to open serious discussion of how laws are interpreting and implementing laws if we wish to ensure adequate protection of the human rights of these vulnerable categories.

In the absence of domestic jurisprudence based on the LITP, we need to revert to relevant international standards in this area to compare whether or not they are being observed. But first, we must establish why those international standards are necessary, where do they come from, and why they have supremacy over the domestic legislation. This question is essential as in practice, the legal assistance that SLGASI (Strategic Litigation Group on Asylum and Statelessness Issues) provides regularly invokes international standards and quotes cases from international tribunals, namely the ECtHR. But those are overlooked and ignored not only by the administrative bodies, but by the courts as well where the decisions by the administration are subject to a guaranteed right to judicial review.

The question of adhering to international standards and international law is not something new. However, when Macedonian courts are in question (although the situation seems to be improving, albeit slowly) the question of international law seems to have secondary meaning if any. Often in cases involving asylum seekers and determining their rights and obligations, you will find lawyers, such as from the SLGASI of MYLA. Invoking important and leading cases in this area when pleading their cases before the courts. Even, so invoking those norms is also often in the preliminary proceedings before the MoI. However, for some reason, both MoI and courts failed to provide a proper address and certainly appears to be unwilling to discuss them and put them in the context of the instant case.

There seems to be a constant tension between the application of domestic and international law in individual cases. One of the main reasons for ignoring international pleadings is the traditional stance on the part of the courts that Republic of North Macedonia's judicial system is a continental one, and quoting individual cases, even from international tribunals and bodies recognized by North Macedonia, is an attribute of "common law", and not continental (or sometimes being referred to by the courts as "civil law").

In our opinion, such division is manifestly wrong to start with. First, whether a particular legal system belongs to a certain legal tradition or not, is not a question to be asked in the realm of international law. And second, Republic of North Macedonia is a party of different bilateral and multilateral international agreements, conventions, declarations, etc. These instruments establish certain rights but also obligations that need to be met.

It is common for all international treaties that, state official must adhere to State's international obligations otherwise the state official may violate such international obligations, and thus invoke responsibility of the State under international law.

Asylum cases involve application of international law because asylum seekers are foreigners, who come from one jurisdiction, pass through other jurisdictions to arrive in North Macedonia, where they choose to apply for asylum. At that particular moment in time, State's international obligations are triggered and must be met.

Responsibility of states

States can be responsible, both for its actions and omissions, for failure to fulfill internationally assumed obligations. However, matters a bit more complex when it comes to an understanding the sources of this doctrine, when it comes to daily operations of any administrative and judicial bodies with the Republic of North Macedonia, although certain laws clearly direct towards foreign judgements as being able to be directly applied, alongside the views and reasoning expressed therein.[8]

International law is always applicable in situations involving asylum seekers and refugees, because there is always a foreign national (or a stateless person) involved in those proceedings. International conventions prescribe the minimum standard of treatment and procedures when dealing with those types of situations. There are often multiple jurisdictional questions involved, bearing in mind that the foreigner may start their journey in his home jurisdiction and travel through multiple jurisdictions before coming to its ultimate destination.

International standards are applicable because of a variety of reasons:

Firstly, the LITP refers to international standards, and invokes the provisions of the Refugee convention. Also, the Constitution of the Republic of North Macedonia prescribes that internationally ratified agreement for a part of the domestic legal order, and hence they cannot be amended or altered by law or other domestic regulation.[9]

Secondly, any country that choses to ratify or adopt a particular international legal instrument, undertakes that it shall adhere to the principles of this international instrument and adjust its legislation and/or practices accordingly.

Thirdly, this is required by the "Draft Articles for Responsibilities of States for Internationally Wrongful Acts" (Draft articles)[10] that are codify the customary international law and therefore are binding on all States. The emphasis in the Draft articles is on the secondary rules of State responsibility: i.e., the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow there- from.

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[8] Law on Courts, Article 18

[9] Constitution of the Republic of North Macedonia, Article 118

[10] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

According to Article 1[11] "every internationally wrongful act of a State entails the international responsibility of that State". Its commentary inter alia state Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility.

An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.[12]

According Article 2 there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

One of the most important articles which distinguishes the characterization of such act and its interconnection with the domestic law is Article 3. The Article states that "*characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*"

Quite often, domestic authorities (rightfully) fell that their actions and/or omissions or application of the law at a particular situation should be viewed from the perspective of the domestic legal order. And when they survive the test of the legal remedies, that renders them lawful.

However, this article aims to erase any ill interpretations on the relationship between how an act is being viewed from the perspective of domestic and international law, and which view is relevant, from the perspective of international law.

Article 4 deals with the conduct of organs of a State, and according to this article:

"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

Perhaps the key provision in understanding that the shortcomings of the courts, as the members of the *judicial function* i.e. failure to apply international legal standards which the domestic legal order ratified constitute a breach on the part of the State.

[11] For the purposes of the articles, the term "internationally wrongful act" includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act.

[12] Report of the International Law Commission on the work of its fifty-third session, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, page 32, Article 1, Commentary

After having establish the general international framework on responsibility of States, we further engage in discussion about international standards in cases of asylum and deprivation/limitation of freedom of movement and define crucial terms.

DEFINITION OF DETENTION

Placing a person in a shelter is considered as a restriction of his/her freedom of movement, according to the national legislation. However, in this paper, we argue that sheltering the persons is equal to detention. If we look at the definition of the term "detention", we can conclude that that presupposes restriction of movement and adds some additional elements that are equally present when persons are accommodated in the shelter center.

The Directive 2013/33/EU of the European Parliament and of the Council of June 26 2013 laying down standards for the reception of applicants for international protection (recast) defines detention as "means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement."[13]

According to UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* "detention" refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centers or facilities.[14]

If we transpose these two authoritative definitions in the national context, we can conclude that in the shelter centers, foreign nationals:

- are confined in a particular place;
- they are deprived of their freedom of movement;
- the deprivation of liberty is in a close place;
- they are not permitted to leave the premises at their own will.

In sum, the confinement of the asylum seekers in shelter centers is equal to detention, regardless that Article 64 of the Law defines in a less strict manner-a measure to restrict the freedom of movement.

INTERNATIONAL NORMS ON DETENTION

The EU law and national jurisprudence of the ECtHR of the EU, the case-law of the ECtHR, and other international norms and soft law developed by various bodies, such as the UNHCHR, set the international standard of behavior within which we will place the analytical framework of the topic.

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[13] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

[14] UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012: https://www.refworld.org/docid/503489533b8.html*

For this paper, we will analyze what are the international norms and standards of various issues which are relevant for the detention of asylum seekers: detention *per se*, conditions of detention, effective remedy for the conditions of detention and right to legal assistance. After pinpointing them, we will proceed with analyses as to what rights may be violated if the State acts contrary to the international norm.

DETENTION OF ASYLUM SEEKERS

The ECHR and its Protocols do not provide for a right to asylum. According to the ECtHR jurisprudence, the right to control the entry, residence and expulsion of non-nationals rests with the States.[15] Also, the ECHR allows States to control the liberty of foreign nationals in an immigration context. Thus, in certain circumstances, asylum seekers may be detained until a State grants them authorization to enter or remain in the country. However, the Member States of the Council of Europe are under the obligation to secure to everyone within their jurisdiction, including migrants, to respect the rights guaranteed by the ECtHR.

Under Article 5 § 1 (f) of the ECHR, migrants may be deprived of liberty only by a procedure prescribed by law, and the measure can only be justified on two grounds: to prevent unauthorized entry onto the national territory or for the purpose of expulsion.

The UNHCR Guidelines further elaborate on the detention in general. According to Guideline 3 any detention or deprivation of liberty must be in line with and authorized by national law. If not, the deprivation of liberty would be unlawful, both as a matter of national as well as international law.

Detention laws must conform to the principle of legal certainty. This requires, *among other things*, that the law and its legal consequences be foreseeable and predictable. Explicitly identifying the grounds for detention in national legislation would meet the requirement of legal certainty.

According to the UNHCHR Guidelines, the insufficient guarantees in law to protect against arbitrary detention, such as no limits on the maximum period of detention or no access to an effective remedy to contest it, could call into question the legal validity of any detention.

If we apply these criteria to our national law, we may argue that the law of international and temporary protection is both foreseeable and predictable unless otherwise proven in a specific case. Furthering, if we look at the arbitrariness of detention, we can filter several elements that prevent a detention from being considered arbitrary.

The detention must be carried out in good faith,[16] be closely connected to the purpose of preventing unauthorized entry or expulsion, that the place and conditions of detention must be appropriate, and then the length of the detention must not exceed that which is reasonably required for the purpose pursued[17]. Such detention will cease to be lawful if the proceedings are carried out without due diligence[18] or if there is no

[15] CourTalks disCOURs, Asylum, https://www.echr.coe.int/Documents/COURTalks_Asyl_Talk_ENG.pdf
[16] EU Directive is using the standard acting with due diligence. See Article 9 of the Directive.
[17] *Saadi v. Italy* [GC], 37201/06, ECHR 2008
[18] *Chahal v. the United Kingdom*, 22414/93, 15 November 1996, Reports of Judgments and Decisions 1996-V

longer a realistic prospect of removal[19] . Under Article 5 § 2 of the ECHR, the detained asylum seekers must be speedy informed of the reasons for their detention[20] in a language that they understand.

Similar criteria are given in UNHCR Guidelines. Guideline 4 states that "arbitrariness" is to be interpreted broadly to include unlawfulness and elements of inappropriateness, injustice, and lack of predictability. Any detention needs to be necessary in the individual case, reasonable and proportionate to a legitimate purpose. Further, failure to consider less coercive or intrusive means could also render detention arbitrary.

As a fundamental right, decisions to detain are based on a detailed and individualized assessment of the necessity to detain in line with a legitimate purpose.

The EU Directive, preambular paragraph 20, also states that detention should be a last resort measure and may only be applied after all non-custodial alternative measures to detention have been duly examined.

In the case of *Khlaifia and Others v. Italy* (no. 16483/12), concerning the holding of irregular migrants on Lampedusa and on ships in Palermo harbour, the ECtHR held that there had been a violation of Article 5 § 1 of the ECHR because the applicants' deprivation of liberty had not satisfied the general principle of legal certainty and was not compatible with protecting the individual against arbitrariness, i.e. it had not been "lawful".

According to ECtHR, the applicants had not only been deprived of their liberty without a clear and accessible legal basis, but they had also been unable to enjoy the fundamental safeguards of habeas corpus, for example, in Article 13 of the Italian Constitution. Since any decision had not validated the applicants' detention, they had been deprived of those essential safeguards. That led the ECtHR to find that the provisions applying to the detention of irregular migrants were lacking in precision.

In the case *Abdolkhani and Karimnia v. Turkey* (no. 30471/08) the ECtHR held that in the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the legal system had failed to protect the applicants from arbitrary detention. The ECtHR ruled that there had been a violation of Article 5 § 2.

We can conclude that various elements may trigger arbitrariness, among which are the conditions of detention and the authorities' obligations to consider other less coercive means of detention. Concerning the latter, the analyzed national decision reveals that there is nothing to reveal that the state organ even made an attempt to consider other alternatives for detention, as given in Article 64 paragraph 1 line 1 of the Law.

CONDITIONS OF DETENTION

According to the EU Directive, paragraph 18, applicants in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation. According to Article 10 detained applicants shall have access to open-air spaces.

[19] *Mikolenko v. Estonia*, 10664/05, 8 October 2009
[20] *Louled Massoud v. Malta*, 24340/08, 27 July 2010

Article 3 of the ECHR requires that receiving States provide accommodation and decent material conditions to these asylum-seekers who are impoverished and wholly dependent on State support. In its landmark judgment on the issue[21] , the ECtHR found that Greece did not meet its obligations under Article 3 because it did not secure the applicant adequate reception conditions when his asylum procedure was pending. These were the elements that led the ECtHR to such a conclusion:

- the severe overcrowding and inadequate sanitation conditions in the migrants' reception centre where the applicant was initially detained;
- following the release, the man lived for many months in a park, in a state of extreme poverty, unable to cater for his most basic needs.
- the applicant lived in a constant state of fear of being attacked and robbed, and there was no likelihood of his situation getting any better.

The ECtHR reiterates (*Mahamed Jama v. Malta*, no. 10290/13, §§86-87) that ill-treatment must attain a minimum level of severity if it falls within the scope of Article 3 of the ECHR. The ECtHR ruled that the minimum level of severity depends on all the case circumstances, such as the duration of the treatment, its physical and mental effects, or the victim's State of health. Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the ECtHR will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (*Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, §§ 95-96).

Under Article 3 of the ECHR, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (*Riad and Idiab*, § 99). When assessing conditions of detention, account has to be taken of the applicant's cumulative effects and specific allegations (*Dougoz*, § 46).

In assessing whether there is a violation of Article 3 of the ECHR in the inhuman and degrading treatment of detainees, the ECtHR had developed criteria based on which it assesses the conditions.

Firstly, it assesses the length of the period during which a person is detained in specific conditions (*Alver v. Estonia*, no. 64812/01, § 50).

Secondly, it assesses the personal space available to a detainee. As a general rule, the space considered desirable by the Committee for the Prevention of Torture ("CPT") for collective cells is 4 sq. However, the ECtHR has recently confirmed that the requirement of 3 sq. m of floor surface per detainee (including space occupied by furniture but not counting the in-cell sanitary facility) in multi-occupancy accommodation should be maintained as the relevant minimum standard for its assessment under Article 3 of the ECHR (see *Mursič*, §§

[21] M.S.S. v. Belgium and Greece [GC], 30696/09, ECHR 2011

110 and 114). The ECtHR also considers the space occupied by the furniture items in the living area in reviewing complaints of overcrowding (*Petrenko v. Russia*, no. 30112/04, § 39).

Extreme lack of space in prison cells weighs heavily as an aspect to be taken into account to establish whether the impugned detention conditions were "degrading" within the meaning of Article 3 of the ECHR (*Mursič v. Croatia* [GC], no. 7334/13, § 104).

In the case of *Ananyev and Others v. Russia* (app. no. 42525/07 and 60800/08, §148) the ECtHR articulated three elements for the assessment of violation of Article 3 of the ECHR on account of the lack of personal space:

- each detainee must have an individual sleeping place in the cell;
- each detainee must have at his or her disposal at least three square metres of floor space; and
- the cell's overall surface must allow the detainees to move freely between the furniture items.

The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3.

For instance, in *T. and A. v. Turkey* (no. 47146/11 §§ 91-99), the personal space available to the first applicant for the three days of her detention had been limited. There had been only one sofa-bed on which the inmates took turns to sleep. The *Gavrilovici* case (no. 25464/05, §§ 41-44) concerned a longer detention period than that endured by the present applicants (five days), with the aggravating factors that the four inmates were obliged to sleep on a wooden platform about 1.8 m wide. Also, the case of *Koktysh v. Ukraine* (no. 43707/07, §§ 22 and 91-95) concerned detention periods of ten and four days in a very overcrowded cell, where prisoners had to take it in turns to sleep, in a prison where the conditions had been described as "atrocious".

In the end, when the ECtHR finds that the issue of overcrowding is not significant enough under Article 3 of the ECHR it also takes into account the other aspects of detention conditions. Those aspects include:

- the possibility of using toilets with respect for privacy, the privacy in the cell (*Novoselov v. Russia*, no. 66460/01, §§ 32 and 40-43)
- the ventilation (*Torreggiani and Others*, § 69; *Babushkin v. Russia*, no. 67253/01, § 44),
- the access to natural air and light, the quality of heating and compliance with basic hygiene requirements (*Khlaifia and Others* v. Italy, no. 16483/12, §167), and
- the access to outdoor exercise (*István Gábor Kovács v. Hungary*, no. 15707/10, § 26).

The ECtHR notes that the Prison Standards make specific mention of outdoor exercise and consider it a basic safeguard of prisoners' well-being that all of them, without exception, be allowed at least one hour of exercise in the open air every day and preferably as part of a broader programme of out of cell activities (*Ananyev and Others*, § 150).

According to the CPT,[22] all detainees have a right to at least one hour of exercise in the open air every day regardless of how good the material conditions might be in their cells. These standards also say that outdoor

[22] CPT standards, document no. CPT/Inf/E (2002) 1-Rev. 2013, § 48.

exercise facilities should be reasonably spacious and, whenever possible, provide shelter from inclement weather.

As does the CPT, the ECtHR considers that access to adequately equipped and hygienic-sanitary facilities is essential importance for maintaining the inmates' sense of personal dignity. A genuinely humane environment is not possible without ready access to toilet facilities or the possibility of keeping one's body clean.[23]

Regarding access to toilets, the ECtHR has noted that when the lavatory pan is placed in the corner of the cell and lacked separation from the living area or was separated by a single partition one to one a half meters high, that resulted in lack of privacy for the detainees (*Aleksandr Makarov*, § 97)

The way the showering was organized did not afford the detainees any elementary privacy, for they were taken to shower halls as a group, one cell after another, and the number of functioning showerheads was occasionally too small to accommodate all of them (*Goroshchenya*, § 71).

The conditions of detention of migrants or asylum-seeker have also been subject to several Chamber judgments. Example in *SD v. Greece* (no. 53541/07, §§ 49-54), the ECtHR found that to confine an asylum-seeker for two months in a prefabricated unit, without any possibility of going outside or using the telephone, and without having clean sheets or sufficient toiletries, constituted degrading treatment. In the case of *Tabesh v. Greece* (no. 8256/07, §§ 38-44) the impossibility of leisure activity and appropriate meals were sufficient for the ECtHR to reach that was degrading treatment. It reached a similar conclusion in *AA v. Greece* (no. 12186/08, §§ 57-65), where no facility was available for leisure or meals, where the poor State of repair of the bathrooms made them unusable and where the detainees had to sleep in dirty and cramped conditions.

In the case of *MSS V. Belgium and Greece* (no. 30696/09, §§230, 233) the ECtHR noted that, the detainees were obliged to drink water from the toilets. In a number of cells, there was only 1 bed for 14 to 17 people. Several detainees were sleeping on the bare floor because there were not enough mattresses. There was insufficient room for all the detainees to lie down and sleep at the same time. There was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and that the detainees were deprived of outdoor exercise. So, the ECtHR ruled that the conditions of detention were unacceptable which led to a degrading treatment contrary to Article 3 of the ECHR.

THE ROLE OF THE LEGAL COUNSEL

According to Article 4 of the EU Directive, Member States are obliged to ensure that legal advisers or counsellors and persons can communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.

[23] See Point 15 of the Standard Minimum Rules for the Treatment of Prisoners and point 19.4 of the European Prison Rules.

In a similar line, Guideline 7 of the UNHCH Guidelines prescribes that communication between legal counsel and the asylum-seeker must be subject to lawyer-client confidentiality principles. Lawyers need to have access to their client, records held on their client, and meet with their client in a secure, private setting.

In the case of *Rahimi v. Greece* (app. no. 8687/08) the ECtHR held that there was a violation of Article 5 § 4 because he applicant had been unable in practice to contact a lawyer. Furthermore, the information brochure outlining some of the remedies available had been written in a language which he would not have understood, although the interview with him had been conducted in his native language. The applicant had also been registered as an accompanied minor, but he did not have a guardian who could act as his legal representative. Accordingly, even assuming that the remedies had been effective, the ECtHR failed to see how the applicant could have exercised them.

REVIEW OF DETENTION

Article 5 § 4 of the ECHR requires access to a judge, who must decide speedily[24] on the legality of their detention after a thorough examination of all the facts and carry out the periodic review of the detention if it has been prolonged.

In the case *SD v. Greece* (no. 53541/07) the ECtHR found that Greece violated Article 5 § 4 the ECHR because the legal system had not afforded the applicant (asylum seeker) any opportunity of obtaining a judicial decision from the domestic courts on the lawfulness of his detention. The decision to detain an alien was inseparable from the decision to deport him.

In the case *Khlaifia and Others v. Italy* (app. no. 16483/12) the ECtHR held that Italy violated Article 5 § 4 because the legal system had not provided the applicants (irregular migrants) with a remedy whereby they could have obtained a decision by a court on the lawfulness of their deprivation of liberty.

Also, in the case *Abdolkhani and Karimnia v. Turkey* (app. no. 30471/08) the ECtHR found that Turkey had violated Article 5 § 4 because the applicants had been denied legal assistance and had not been informed of the reasons for their detention. Also, the applicants' right to appeal against their detention had been deprived of all effective substance.

In the end, we would like to refer to Guideline 7 of UNHCR Detention Guidelines, which states that that "following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one-month mark and after that every month until the maximum period set by law is reached.

[24] Sławomir Musiał v. Poland, 28300/06, 20 January 2009

REMEDY FOR THE CONDITIONS OF DETENTION

The Directive 2013/33/EU states that: "Concerning administrative procedures relating to the grounds for detention, the notion of 'due diligence' at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures."

In the case *RU v. Greece* (no. 2237/08), the ECtHR held that as there were no remedies in Greece enabling the applicant to complain about his detention conditions, the ECtHR further held that there had been a violation of Article 13 (right to an effective remedy) of the ECHR.

In the case of *Rahimi v. Greece* the ECtHR held unanimously that there had been Article 13 of ECHR. According to the ECtHR the information brochure provided to the applicant did not indicate the procedure to be followed to make a complaint. The ECtHR pointed out that CPT had noted the absence in Greece of an independent authority for the inspection of detention facilities of the law-enforcement agencies. The ECtHR noted that the courts were not empowered to examine living conditions in detention centres for illegal immigrants and to order the release of a detainee on those grounds. Lastly, the ECtHR did not consider that the information brochure in Arabic referring to the available remedies would have been comprehensible to the applicant, speaking Farsi.

In the case *MSS v. Belgium and Greece*, the ECtHR held that there was a violation of Article 13 of ECHR taken together with Article 3 by Greece because of the deficiencies in the asylum procedure, such as insufficient information about the procedures to be followed, the lack of a reliable system of communication between authorities and asylum seekers, the lack of training of the staff responsible for conducting interviews, a shortage of interpreters and a lack of legal aid el.

Similarly, in *Khlaifia and Others v. Italy* the ECtHR held there had been a violation of Article 13 taken together with Article 3 of the ECHR because the Government had not indicated any remedies available to the applicants related to the conditions in which they were held.

Conclusions

It appears that in the legal tradition of the Republic of North Macedonia, state organs tend to apply only written legislation and regard them as the sole sources of law and interpretation. At the same time, courts tend to avoid and sometimes ignore pleadings to apply international law directly or in conjunction with domestic law. Although it might be a debatable issue on whether or not this is in face the case *stricto sensu*, one would have considerable difficulties in justifying a position where only relying on domestic legislation (and practice) is sustainable and correct. On the other hand, it is virtually impossible for a domestic legal order to be outside the auspices of the international principles. Therefore, when it comes to assumed international obligations, they should fit squarely within the above elaborated principles.

The core question is where did the system fail in the X.X. case, if it did? And more importantly, does the current practice of the courts fall short of meeting its obligations to afford procedural guarantees to aliens when their rights and obligations as asylum seekers are observed? Especially in instances when their liberty is being affected.

Failing to apply international standards in this area, certainly makes national decisions arbitrary. International standards are first to be examined in cases of asylum and especially in cases involving asylum and deprivation/limitation of liberty. International standards can be applied directly.

Legal commentaries on laws based solely on academic and desk reviews are certainly welcomed and invaluable source of critical thinking. However, commentaries on live cases like the instant one, provide us with the status what law actually is *de lege ferenda*, and not what the law should be (*de lege lata*). Our paper aims to attract attention to the way international standards are applied or should be applied by courts in cases involving refuges, asylums and migrants and serve as a catalyst for further discussion on this topic.